1980

# Jack H. Ryan and Emma Jean Ryan, Husband and Wife v. J. Elliot Earl : Appellant'S Brief

Utah Supreme Court



JAMES C. JENKINS; Attorney for Appellant;BURTON H. HARRIS; Attorney for Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

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| JACK H. RYAN and EMMA JEAN RYAN, husband and wife, | * | |
| Plaintiffs-Respondents, | * | Case No. 16843 |
| vs. | * | |
| J. ELLIOT EARL, | * | |
| Defendant-Appellant. | * | |

# APPELLANT'S BRIEF

Appeal from the Judgment of the
First District Court

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| Respondents, | * | Case No. 16843 |
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| J. ELLIOT EARL, | * | |
| Appellant | * | |

# APPELLANT'S BRIEF

## STATEMENT AND NATURE OF THE CASE

This is an equitable action initiated by the Respondent seeking specific performance of an alleged oral contract for the purchase of land and counter claim by Appellant for partition.

## DISPOSITION IN THE LOWER COURT

Lower Court found for the Respondent and awarded specific performance under the alleged oral contract, and did not rule on the counter claim for partition as a result of the grant of specific performance.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the Lower Court, and an order remanding the case to District Court for hearing Appellant's claim for partition.

## ISSUES

1. The evidence fails to establish as a matter of fact and law, a contract between the parties for the sale and purchase of real property.

2. Assuming an oral contract did exist, there was insufficient performance to exempt it from the Utah Statute of Frauds.

## STATEMENT OF FACTS

1. J. Elliot Earl, Appellant and hereinafter called Earl, and Anthon B. Haney, Jr., were co-tenants of the subject real property of this action. Each had an undivided one-half interest therein (TR pp 35) and upon which Earl in 1966 had constructed a cinder block building. (TR pp 37-38, 54 and 57)

2. In December, 1977 Respondent, Jack Ryan, hereinafter called Ryan, offered to purchase from Appellant Earl, the subject property for $55,000.00 (TR pp 108-109) and tendered a check to Earl in the sum of $5,000.00 (TR pp 39-41, 55, 57, 109) as a "good faith" check. The check was not cashed nor accepted as payment (TR pp 162, 179 and 180).

3. Ryan desired to buy and construct a house on the subject land and persisted in his efforts to purchase it making several offers during the period of July to September, 1977. Earl, however, rejected each offer (TR pp 41, 49-52, 62-63, 84, 220, 228, 231, 234, 243, 245).

4. As a result of Ryan's persistent desire to build a home on the property, Earl suggested and consented to Ryan's purchase of Mr. Haney's one-half interest (TR pp 48-49, 167, 237). Earl also suggested that upon his purchase of the Haney's interest, that Earl and Ryan should enter into a written agreement identify each party's interest in the property and specifying the condition upon which the property would be petitioned or segregated (TR pp 167, 242-248).

5. On September 23, 1977, Ryan purchased Haney's undivided one-half interest in the land for the sum of $27,500.00 thus becoming a co-tenant with Earl (TR pp 216).

6. On September 30, 1977, Ryan renewed his offer to purchase Earl's one-half interest in the property (TR pp 169-172). Earl did not accept the offer (TR pp 162). However, they conversed about the possibility of purchase and Ryan gave Earl, in exchange for the original check issued July, 1977 (Plaintiff's Exhibit 2) a check in a similar amount of $5,000.00 dated September 30, 1977 (Plaintiff's Exhibit 3) and asked him to retain the same as a "good faith" check (TR pp 63, 221, 234). Ryan's new offer to purchase was in the sum of $28,500.00 payable as follows:

> $5,000.00 down, payment of an additional $12,761.90 in the form of a mortgage payoff which Earl had incurred against the Building on said property, leaving a remaining balance of $10,738.10.

Ryan was again instructed by Earl that he had no intention of selling his one-half interest in the property; that it was not for sale; but in order to appease him Earl held the check (Plaintiff's Exhibit 3) and placed the same in the desk drawer, but never negotiated it (TR pp 172, 233, 245-246).

7. With neither the knowledge or authorization from Earl, Ryan paid off the mortgage against the sujbect property on November 15, 1977 (TR pp 231, 240).

8. On or about the 10th day of December, 1977 Ryan issued a check in the amount of $9,587.01 (Plaintiff's Exhibit 4) made payable to Earl and left the same at Earl's place of business (TR pp 130-131, 232). Earl did not discover the existence of said check for over one year later, in February, 1979 (TR pp 232).

9. The check for $5,000.00 issued September 30, 1977 (Plaintiff's Exhibit 3) which was given in exchange for the $5,000.00 check issued July 1977 (Plaintiff's Exhibit 2) was also voided by Ryan (TR pp 172.) See Defendant's Exhibit 27. None of the checks were ever cashed or negotiated, and all were returned to Ryan (TR pp 233, 245-246).

10. Earl never accepted Ryan's offer to purchase and consistently requested that the parties enter into a written agreement defining their respective rights and interests as co-tenants (TR pp 244-245).

11. No written contract now exists or ever was entered into by the parties for the sale or purchase of said property (TR pp 243-244).

12. From January 1978 to January 1979, Earl became aware of improvements made by Ryan to subject property and on numerous occasions requested that the parties enter into a written agreement identifying their respective co-tenant interests (TR pp 237, 243-244).

## ARGUMENT AND LAW

PART I: EXISTANCE OF CONTRACT.

1. Respondent Ryan's Complaint alleges the existance of an oral contract for the purchase and sale of Appellant Earl's interest in the subject property. Respondent must prove by clear and convincing evidence, a definite agreement existed between the parties.

> It is essential that the parole agreement or gift should be established by clear, unequivocal, and definite testimony, and the facts claimed to be done thereunder should be equally clear and definite and referrable exclusively to the contract or gift. Ravarino v. Price, 123 Utah 559, 26 P2d 570 (1953); See also 73 AmJur 2nd 401. (Emphasis added)

> The Plaintiff in declaring specific performance of an oral contract must establish the terms thereof with a greater degree of certainty than is required in an action at law, and he must show a clear mutual understanding and a positive agreement of both parties, to the terms of the contract. Christensen v. Christensen 9 Utah 102, 339 P2d 101 (1959) (citing other Utah authorities, Emphasis added).

2. There is no dispute that Ryan made several offers to purchase Earl's interest in the property. The evidence, however, can only support a finding that all such offers were rejected. There exists no written agreement and Ryan's complaint alleged oral contract which is denied by Earl. It does little good to argue between the parties as to what was said and not said, hence the whole rational behind the Statute of Frauds. A review of the facts fails to establish any conduct of the parties which could be construed as constituting an acceptance thereby creating a contract. The facts simply state the following:

a) None of the checks issued were ever negotiated. On the contrary, all were returned to the Respondent.

b) Both checks for $5,000.00 (Plaintiffs' Exhibits 2 and 3) were voided by Ryan and written on insufficient funds account even had the checks been negoiated (TR pp 172, 181-182; Defendant's Exhibit 27).

c) Respondent was at all times aware that the checks were not negotiated and made periodic inquires as to whether they would be negotiated (TR pp 94, 179-180, 245-256).

d) Appellant Earl paid the taxes on the property each year (TR pp 234-235; Defendant's Exhibit 23).

e) The parties continued to use the premises jointly as co-tenants (TR pp 150, 153, 178, 238-240).

f) No deed or contract of conveyance was ever executed (TR pp 243-244).

g) Earl consistently refused to sell and requested that the parties sign an agreement defining their rights as co-tenants of the property (TR pp 41 49-51, 62-63, 84, 162, 220, 237, 243-245).

3. In viewing the evidence in a light most favorable to the Respondent Ryan, as to the existance of an oral contract for sale of land, all we have is a desire on his part to buy the property; many inquires; the purchase of the co-tenant interest; the leaving of $5,000.00 "good faith" check; the replacement of thereof by another for the same and three months later; the voiding of both; the unknown delivery of another check (Plaintiff's Exhibit 4) for a thousand dollars less than the alleged contract price (TR pp 232) and the discovery, a year later, of the same; the unauthorized and undiscovered payment of a mortgage; and finally a demand for a deed.

4. Not one fact lends itself to an acceptance by Earl of Ryan's over-bearing and irrational efforts to buy the land. Ryan's acts amount only to his determination to buy the land; his pushing onto Earl unwanted, unnegotiated, and unknown checks; an unauthorized mortgage payoff; and finally more than a year later, a demand for delivery of a deed.

5. The only benefit that could be construed to be consideration given to Earl is the payment of the mortgage

which payment was neither authorized by nor known to Earl.

6. It is encumbant upon Ryan to prove the existance of the alleged oral contract to be firm, definate, certain and unambiguous in order to have specific performance and sufficient performance as to remove it from being barred the Statute of Frauds. Section 25-5-1, Utah Code Annotated (1953 as amended) Hargreaves v. Burton, 59 Utah 575, 206 P 262 (1922). Price v. Lloyd 31 Utah 83, 86 P 767 (1980); Randall v. Tracy Collin Trust Company, 6 Utah 2d 18, 305 P2d 480 (1956); Ravarino v. Price, supra; Christensen v. Christensen supra.

7. The problem of part performance will be discussed in the following section, but before part performance even need be considered, the Respondent needs to prove with clear and convincing evidence the existance of the alleged oral contract, the term of which need be clear, definate, referrable and exclusive. Ravarino v. Price, supra.

8. In the alleged oral contract in question, the Court was shown no evidence except offers unaccepted, checks unaccepted, uncashed, unknown, wrong amount, payments unknown and unauthorized, no closing date, no agreed method of payment, no change in the payment of taxes, and no date of possession, except those coincident with co-tenancy (TR pp 104).

9. The fact that, though Ryan maintains he had an agreement, nowhere in the 255 pages of trial transcript is there clear, definate, unequivocal testimony as to the

terms of the alleged contract. The minimum requirements to establish a contract must be price, dates of payments, closing, and possession, method of performance, and title to be conveyed and all of these by clear and convincing evidence. None of these factors were shown and even if referred to, fell far below the standard required.

PART II: PART PERFORMANCE.

1. Assuming, however, a finding by clear and convincing evidence that an oral contract existed; Ryan as Plaintiff must also prove by clear and unequivocal evidence that he has performed under the contract to the extent that his acts of performance (1) "are clearly referrable to [the] contract existing between the parties in relation to the subject matter in dispute;" and (2) "Plaintiff has been defrauded as a result of such acts." Ravarino v. Price, supra.

As provided it 73 AmJur 2d 400, the doctrine of part performance operates not upon the theory that the part performance is a substitute for the written evidence required by the statute of frauds, but on the theory that the Appellant may be estopped in view of the part performance to assert the statute as a defense. Part performance takes the case out of the statute, not because it furnishes proof of the contract or because it makes the contract any stronger, but because it would be intolerable in equity for the owner of a tract of land knowingly to suffer another to invest time, labor and money in that land

upon good faith of a contract which did not exist.

The conduct of the Respondent Ryan is not performance under the alleged contract, but acts which were reasonably referable to and expected of Respondent as a co-owner of real property.

2. Consider the acts of Respondent Ryan:

a) Payment:

> Under the part performance rule, payment by the buyer in whole or in part is not deemed to be sufficient to permit the Court to specifically enforce the oral promise to convey, since he has the quasi-contractual remedy of recovering back what he has paid. Contracts by John D. Calamari and Joseph N. Perillo, West Publishing Company, 1970, pp 465. See also 2 Corbin Section 419; Restatement, contracts (2nd) Section 197, comment c.

Respondent-Ryan alleges that payment was tendered in the form of checks and a mortgage payoff. The evidence overwhelmingly establishes that the checks were not accepted by Appellant Earl and were never negotiated. Additionaly, the first check was subsequently voided and the first and second checks (Exhibits 3 and 4) were written on deficit balance accounts. The loan repayment was not contemplated, requested, or authorized by Appellant-Earl. In fact Appellant-Earl liquidated the mortgage obligation in order to clear title to the land of which he was co-owner, in anticipation of financing his home construction--not to make performance under contract to purchase. The benefit of clear title inures to both parties as co-tenants of the realty.

This Court in Maxfield v. West, 6 Ut 327, 23 P 754 (1890) held that the fact that a part of the purchase

price has not been paid was not itself sufficient in equity to take a parole contract out of the statute of frauds.

b) Possession: While Respondent-Ryan claims exclusive possession of the subject property, no evidence exists to sustain that position. On the contrary, by Respondent's own admission Appellant-Earl was on the premises on "numerous occasions" (TR pp 150, 153). It is also uncontroverted that Appellant continued to use the premises for storage and even now has possessions at the building on the subject property (TR pp 238-240). It is also agreed by the parties that Appellant purchased his interest in the subject property primarily as an investment. His possession has always existed if in no other manner, from his mere holding the same for investment and appreciation.

The law in Utah, as well as most jurisdictions, is well established that since possession of land by a tenant in common inures to the benefit of all co-tenants, such possession under a parole contract of sale from his co-tenants is not a sufficient part performance to take the contract out of the operation of the statute of frauds. Possession by a tenant in common is presumed to be in favor of and for the benefit of his co-tenants and in order for his possession to take an oral contract of sale to him by his co-tenants out of statute, it must show his individual right in the premises to the exclusion of the other co-tenants. (See 73 AmJur 2nd 421).

> It is to be noted that possession by the Plaintiff is regarded as an important fact, on which is generally directly referrable to the contract, and when combined with permanent and valuable improvements which are representative of the existance of an oral contract, virtually every jurisdiction will grant specific performance. The same limitation of course, if placed on the Plaintiff's possession as is found when improvements are relied upon: It must be of such a nature that it would not have been given without the presence of an oral contract to convey. Ravarion v. Price, supra (Emphasis added)

Appellant submits that Respondent-Ryan's possession was not exclusive but jointly exercised with Appellant. Respondent's possession and installation of improvements is not exclusively referable to the alleged contract, but soley to Respondent's status as a co-tenant.

c) Improvements: It must be remembered that Earl was aware of the persistant and anxious desire of Respondent to build a home on the subject property. With this in mind and because of other pressures exerted upon the Appellant at the time, it was Earl who suggested that Respondent purchase Mr. Haney's one-half interest and that they (Appellant and Respondent) then enter into a written agreement to define property ownership. Appellant did not then, and does not now, object to Ryan's construction of a home: however, the construction of the home as well as all other improvements made by Ryan are not "exclusively referrable" to the alleged contract.

> The improvements must be of a kind which would naturally and reasonably be done under a contract so as to indicate the existance of a contract to account for them; they must be made on the fact of the contract and must of course be subsequent to it. . .this court must be convinced that no

> reasonable doubt exists as to whether or not the acts of improvement are explainable on some basis other than on the hypothesis of an oral contract. The reason for this rule is well established in the common experience of mankind to which the enactment of the statute of frauds bears witness: the possibility of fraud and uncertainty in oral promises to convey realty makes it encumbant upon the court to be hesitant in applying a general acception to diverse factual situations, While the fundamental basis of the doctrine of part performance is to prevent fraud, historical precedent has drawn the line where evidentiary facts are not sufficient to show an oral contract was made. Ravarino v. Price, supra (Emphasis added).

Ordinarily the courts hold that activities, improvements and possession by one co-tenant is for the benefit of all co-tenants and not adverse to them. Summary of Utah Real Property Law, Brigham Young University Legal Stidies, J. Ruben Clark Law School, Vol. 1, Chapter 3, Section 3.24, pp 125.

The. . .fact that extensive improvements were made while appellant was living on the property are also not inconsistent with co-tenancy. As this Court stated in Sperry v. Tolley, 114 Ut 303, 199 P2d 542 (1948)

> . . .It is likewise true that the repairs and improvements made in dwellings buildings and fences are acts normally consistent with a tenancy in common and not adverse to it.
> In the instant case the repairs and improvements were such as a person in possession would make for one's own convenience and satisfaction and would not necessarily show an intent to oust co-tenants of their rights or rebut the presumption that they were made for the benefit of all co-tenants. Heiselt v. Heiselt, 10 Ut. 2nd 126, 249 P2d 178 (1960)

## SUMMARY

It is the Respondent in this case who bears the burden of proving by clear and convincing evidence that

(1) an oral contract was created and (2) that sufficient performance or conduct was made on the part of the Respondent which exclusively relates to the alleged contract to exempt it from the effect of the statute of frauds.

It is readily apparent that the evidence before the Court does not support a finding that a contract clearly existed or that there has been performance under such a contract sufficient to obivate the intent and purpose of the Statute of Frauds. Extreme caution is to be exercised in granting such performance unless clearly part performance has occurred.

> The doctrine [of part performance] is to be applied with great care paying particular attention to the policy expressed in the Statute of Frauds and the historical precident where the limits have been defined by process of inclusion and exclusion. Price v. Lloyd, supra

> Courts of equity, in establishing the doctrine invoked by Plaintiff, have not, by any means, intended to annul the statute of frauds, but only to prevent its being made the means of perpertrating a fraud. In order that a Plaintiff might be permitted to give evidence of a contract in writing, and which is in the very teeth of the statute and nullity at law, it is essential that he establish [in equity] by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referrable thereto and which take it out of the operation of the statute.
> The doctrine, in its broadest scope, is that acts will constitute sufficient part performance if they are clearly referrable to some contract existing between the parties in relation to the subject matter in dispute, and as a result of these acts, the Plaintiff has been defrauded. Ravarino v. Price, supra

Appellant submits that no contract was ever entered into. All Respondents offers were rejected. But Respondent, not to be frustrated, attempted to fabricate a contract in order to obtain Appellant's interest in the property. Appellant resists Respondent's efforts to unilaterally

impose an obligation upon the Appellant to sell. Appellant has at no time intended to part with his property. Equity demands in this case that Appellant not be deprived of his property.

## CONCLUSION

In light of the foregoing the Court should reverse the decision of the Lower Court and remand the case for a hearing and judgment to equitably partition the subject property.

RESPECTFULLY SUBMITTED this 24th day of March, 1980.

MALOUF, MALOUF & JENKINS

James C. Jenkins
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that a two (2) true and correct copies of the foregoing Appellant's Brief was mailed, post paid, to Plaintiffs-Respondents Attorney, B. H. Harris at 31 Federal Avenue, Logan, Utah 84321 this 24th day of March, 1980.

Teresa Olsen